

Montana Water Court
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FILED
04/07/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0652-R-2022
Lambert, Kathryn
16.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Deeann D. Durgan; James R. Durgan

CASE 43B-0652-R-2022

43B 40656-00

OBJECTORS: Montana State Board of Land Commissioners

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

The State of Montana, Board of Land Commissioners objected to Deeann D. Durgan and James R. Durgan irrigation claim 43B 40656-00. On February 2, 2023 the parties filed a

Stipulation. The Stipulation is viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

If, at the time an appropriation is made, the appropriator is a lessee of school trust land and if the lessee makes and uses the appropriation on school trust land, the appropriation is owned by the State of Montana rather than the lessee. *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P2d 948 (1985). Implicit in this rule is the determination that the land was indeed fully vested as state school trust land at the time the appropriation was made. *See Findings of Fact, Conclusions of Law, and Memorandum*, Case No. 43A-A, June 29, 2000; *Opinion* (page 3), Case No. 41G-190, July 19, 2005, and *Opinion*, Case No. 41G-3, August 3, 2005.

The Water Court may split a claim with multiple owners into separate claims upon request of all of the claimants prior to issuance of the final decree. Rule 26, W.R.Adj.R.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The place of use for this claim includes a 40.00 acre parcel in the W2NW section 16, T4S, R9E, PARK. This parcel is school trust land. As stated in paragraph 8 of the Stipulation, the State of Montana acquired the title to this parcel on November 8, 1889. The claimants agree that the State of Montana is a co-owner of this claimed right.

2. Claim 43B 40656-00 should be modified to represent only the Durgan portion of the claimed right. Split claim 43B 30159545 should be generated for the State of Montana portion of the claimed right.

3. Claim 43B 40656-00 should be modified as follows: 1) the flow rate should be reduced from 7.50 CFS to 6.80 CFS, 2) the maximum acres should be reduced from 410.00 acres to 370.00 acres, and 3) the 40.00 acre parcel in the W2NW section 16, T4S, R9E, PARK should be removed from the place of use.

4. The elements of claim 43B 30159545 should be same as 43B 40656-00 except: 1) the owner should be MONTANA STATE BOARD OF LAND COMMISSIONERS, 2) the flow rate should be 314.00 GPM, 3) the maximum acres should be 40.00, and 4) the place of use should be 40.00 acres in the W2NW section 16, T4S, R9E, PARK.

CONCLUSION OF LAW

The information provided by the parties is sufficient to split the claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court split claim 43B 40656-00 and make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via USPS Mail:

Deeann D. Durgan
James R. Durgan
4507 Old Yellowstone TRL
Livingston, MT 59047

Service Via E-Mail:

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 40656-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: JAMES R DURGAN
4507 OLD YELLOWSTONE TRL
LIVINGSTON, MT 59047

DEEANN D DURGAN
4507 OLD YELLOWSTONE TRL
LIVINGSTON, MT 59047

Priority Date: OCTOBER 30, 1928
Type of Historical Right: FILED
Purpose (use): IRRIGATION
Irrigation Type: SPRINKLER/FLOOD
Flow Rate: 6.80 CFS
***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.
Climatic Area: 3 - MODERATE
Maximum Acres: 370.00
Source Name: TRAIL CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENESE	17	4S	9E	PARK
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
2		SESESE	23	4S	8E	PARK
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
Period of Use:	APRIL 1 TO OCTOBER 1					
Place of Use:						

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	140.00		S2	9	4S	9E	PARK
2	230.00		N2	9	4S	9E	PARK
Total:	370.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

40655-00

40656-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 30159545 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

Priority Date: OCTOBER 30, 1928

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 314.00 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 40.00

Source Name: TRAIL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENESE	17	4S	9E	PARK

Period of Diversion: APRIL 1 TO OCTOBER 1

Diversion Means: HEADGATE

2		SESESE	23	4S	8E	PARK
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Period of Diversion: APRIL 1 TO OCTOBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO OCTOBER 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	40.00		W2NW	16	4S	9E	PARK

Total: 40.00